

June 18, 2008

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: State of New York

Date of Filing: May 22, 2008

Case Number: TFA-0257

This Decision concerns an Appeal that was filed by the State of New York from three partial determinations that were issued to it by the Office of Electricity Delivery and Energy Reliability (OE) of the Department of Energy (DOE). In these determinations, OE denied in part a request for documents that New York submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, New York seeks the release of the requested documents.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. 5 U.S.C. § 552(b)(1) - (9); see also 10 C.F.R. § 1004.10(b)(1) - (9).

I. Background

In its December 17, 2007, FOIA request, New York sought access to a copy of a study entitled “Grounded in Reality: Eastern Connection,” prepared by Cambridge Energy Research Associates (CERA) in 2004, and to copies of any documents, e-mails or other correspondence between CRA International (CRA) and the DOE, CRA and any transmission developers or stakeholders, and the DOE and the stakeholders involving the DOE’s August 8, 2006, Congestion Study and the DOE’s October 2007 National Interest Electric Transmission Corridor (NIETC) designation order. Pursuant to Section 216(a) of the Federal Power Act, the DOE was required to issue the congestion study in August 2006 and every three years thereafter. The Congestion Study concerns the percentage of maximum capacity at which existing electricity transmission lines are being utilized.¹ The DOE contracted this task out to Lawrence Berkeley National Laboratory (LBNL) which, in turn, retained

^{1/} The DOE used this information in designating an NIETC in the northeastern United States in October 2007. This designation allows entities that wish to build electricity transmission facilities in these corridors, but have been denied permission to do so by state or local governments, to apply to the Federal Energy Regulatory Commission for permission.

the services of CRA to produce the Congestion Study. *See* memorandum of May 30, 2008, telephone conversation between Theresa Brown Shute, OE, and Robert Palmer, OHA Staff Attorney.

In its February 12, 2008, partial determination, OE informed New York that it had searched its files for the CERA study without success, and therefore had no documents responsive to this portion of New York's request. OE further stated that it was continuing to search for responsive documents concerning communications between CRA and the DOE, CRA and transmission developers or stakeholders, and the DOE and the stakeholders involving the Congestion Study. The letter also informed New York that responsive documents could be accessed through the DOE's NIETC website.

As part of its April 18, 2008, partial determination, OE released 33 documents in their entirety and a 34th document in redacted form. This document (hereinafter referred to as "Document 34") consists of hard copies of four pages of a presentation that CRA made to the DOE on July 20, 2006. OE informed New York that the presentation itself could be accessed through the NIETC website, and that the hard copy included handwritten notes, which were withheld pursuant to Exemption 5 of the FOIA. 5 U.S.C. § 552(b)(5). OE also informed New York that it had identified over 12,000 communications between the entities named in the request that "may be responsive" to the request, and that they were currently undergoing agency review. April 18, 2008, determination at 2.

In its May 6, 2008, partial determination, OE stated that it could not "respond to [New York's] request for documentation 'between CRA [] and any transmission developers or stakeholders,'" because generally, under the FOIA, agencies can only provide records that were "created by request of the agency or that the agency is in possession of." May 6, 2008, determination at 1. OE added that it would provide any such communications that it has "in [its] possession due to being a recipient or a sender." May 6, 2008, determination at 1.

In its submission, New York appeals these three determinations, and it also seeks to appeal the positions expressed in an April 28, 2008, e-mail from Theresa Brown Shute, OE, to Maureen Leary, Assistant Attorney General, State of New York. Specifically, New York challenges OE's failure to produce the CERA study and communications between "industry stakeholders" and CRA, OE's redaction of the handwritten notes from Document 34, and its failure to process portions of New York's request in a timely fashion.

II. Analysis

A. OHA's FOIA Jurisdiction

Section 1004.8(a) of the DOE's FOIA regulations defines the OHA's jurisdiction in this area. That section provides that the OHA may consider appeals "when the Authorizing Official has denied a request in whole or in part or has responded that there are no documents responsive to the request . . . , or when the Freedom of Information Officer has denied a request for waiver of fees . . ." 10 C.F.R. § 1004.8(a). Applying these guidelines to the case at hand, the OHA lacks jurisdiction to

consider an “appeal” of Ms. Brown Shute’s April 28 e-mail, or to consider New York’s arguments concerning the timeliness of OE’s response.

Section 1004.2 of the FOIA regulations defines “Authorizing or Denying Official” as being “that DOE officer . . . , having custody of or responsibility for records requested under 5 U.S.C. 552. In DOE Headquarters, the term refers to . . . officials who report directly to either the Office of the Secretary or a Secretarial Officer” 10 C.F.R. § 1004.2(b). In OE, the Authorizing or Denying Official is Marshall E. Whitenton, the Deputy Assistant Secretary for Permitting, Siting and Analysis. *See* February 12, 2008, letter from Mr. Whitenton to Maureen F. Leary, Assistant Attorney General, State of New York at 1; April 18, 2008, letter from Mr. Whitenton to Ms. Leary at 2. Consequently, because Ms. Brown Shute is not an Authorizing or Denying Official, her e-mail does not provide an appropriate basis for an Appeal.

Similarly, the regulations do not provide for an appeal to the OHA of the DOE’s failure to respond to a FOIA request in a timely fashion. Such a failure does not constitute a denial of a request in whole or in part, a statement that there are no responsive documents, or a denial of a fee waiver request. Consequently, the OHA does not have jurisdiction over claims of untimeliness. *See, e.g., EverNu Technology, LLC*, 30 DOE ¶ 80,112 (March 5, 2008) (Case No. TFA-0243); *Citizen Action New Mexico*, 29 DOE ¶ 80,302 (July 6, 2007) (Case No. TFA-0203); *Arlie Bryan Siebert*, 29 DOE ¶ 80,258 (April 20, 2006) (Case No. TFA-0157). Instead, the requester’s remedy in such cases is to seek redress in a federal District Court. 10 C.F.R. § 1004.5(d)(4); *see also* 5 U.S.C. § 552(a)(6)(C)(i). We will, therefore, not consider New York’s arguments concerning the timeliness of the DOE’s response or Ms. Shute’s e-mail.

B. Agency Records

New York also contests OE’s failure in its February 12th response to provide the CERA study, and its finding in its May 6th response that communications between CRA and transmission developers and industry stakeholders are not subject to the provisions of the FOIA. In essence, OE has determined that the CERA study and the communications between CRA and industry entities, that were not in the DOE’s possession at the time of New York’s request, are not “agency records.”

The FOIA does not specifically set forth the attributes that a document must have in order to qualify as an agency record that is subject to FOIA requirements. This issue was addressed by the United States Supreme Court in *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989) (*Tax Analysts*). In that decision, the Court stated that documents are agency records for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. The federal courts have identified four relevant factors for determining whether a document was under an agency’s control at the time of a request:

1. The intent of the document’s creator to retain or relinquish control over the document;
2. The ability of the agency to use and dispose of the record as it sees fit;

3. The extent to which agency personnel have read or relied upon the record; and
4. The degree to which the record was integrated into the agency's record system or files.

See, e.g., Burka v. U.S. Department of Health and Human Services, 87 F.3d 508, 515 (D.C. Cir. 1996).

Applying these standards to the case at hand, we conclude that the CERA study, and communications between CRA and transmission developers and industry stakeholders that were not in the possession of the DOE at the time of the request, are not agency records. With regard to the CERA study, OE informed us that the study was acquired by an OE employee from FERC prior to OE's receipt of New York's request. *See* memorandum of June 3, 2008 telephone conversation between Robert Palmer, OHA Staff Attorney, and Mr. Whinton. This satisfies the first prong of the *Tax Analysts* test. However, the study was not under the control of the DOE at the time of New York's request. Mr. Whinton indicated that, although the employee sent the study to CRA prior to the request, a copy of the study was not retained in the DOE's records. *Id.* Consequently, at that time the DOE did not have "the ability to use and dispose of the record" as it saw fit. Moreover, although the OE employee apparently did read the study, the DOE did not rely on it in making any decisions regarding the Congestion Study or the related NIETC designation order. *See* memorandum of May 22, 2008 telephone conversation between Mr. Palmer and Ms. Brown Shute. Finally, the record's creator, CERA, has clearly expressed an intention to retain control over the record. According to Ms. Brown Shute, CERA declined to provide a copy of the study to OE in connection with New York's request, stating that it considered it to be "business confidential." *See* April 28, 2008 e-mail from Ms. Brown Shute to Ms. Leary. Moreover, only CERA clients are permitted to download the study from CERA's website. *See* <http://www.cera.com>. OE properly concluded that the CERA study is not an "agency record."

With regard to the communications between CRA and transmission developers and industry stakeholders, the DOE is currently reviewing those documents that are in its possession for possible release to New York. The communications that are not in its possession were neither created nor obtained by the DOE. Under the *Tax Analysts* standard, these communications are not "agency records."

However, a finding that certain documents are not "agency records" does not end our inquiry. Section 1004.3(e) of the DOE's FOIA regulations states that

When a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b).

We have also held that this provision is applicable to DOE subcontractors when the contract between the prime contractor and the subcontractor provides that records generated by the subcontractor are

the property of the DOE. *See Martin Becker*, 28 DOE ¶ 80,187 (September 7, 2001) (Case No. VFA-0666). We have examined the contract between LBNL and CRA, and have concluded that it does not include any language providing that the documents in question are the property of the DOE.² OE properly concluded that these documents are not subject to the FOIA.

C. Exemption 5

OE withheld portions of Document 34 pursuant to Exemption 5 of the FOIA. 5 U.S.C. § 552(b)(5). This document, which has the heading “Table 3. Top Constraints, Ranks and Most Affected,” is a list of constraints, or areas of “congestion,” in the northeastern U.S.³ The portions of this document that were withheld consist of handwritten notes in the margins that were authored by a DOE employee.

Exemption 5 shields from mandatory disclosure documents which are “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts “those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive “deliberative process” or “pre-decisional” privilege. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The deliberative process privilege is the only privilege at issue here.

The deliberative process privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. *Sears*, 421 U.S. 132, 150 (1975); *Coastal States*. The purpose of the deliberative process privilege is to promote high-quality agency decisions by fostering frank and independent discussion among individuals involved in the decision-making process. *Coastal States*, 617 F.2d at 866.

Information within the purview of the deliberative process privilege must be both predecisional and deliberative. Information is predecisional if it is prepared or gathered in order to assist an agency decisionmaker in arriving at a decision. *Renegotiation Board v. Grumman Aircraft Eng. Corp.*, 421 U.S. 168, 184 (1975). Predecisional information is also deliberative if it reflects the give-and-take of the consultative process, *Coastal States*, 617 F.2d at 866, so that disclosure would reveal the

^{2/} Since CERA was neither a DOE contractor nor a subcontractor, this regulatory provision is inapplicable to the CERA study.

^{3/} In this context, “congestion” refers to areas where consumers are not able to obtain cheap electricity because transmission wires and facilities are running at or near capacity. *See* memorandum of May 22, 2008, telephone conversation between Mr. Palmer and Mr. Whitenton.

mental processes of the decision-maker. *National Wildlife Federation v. United States Forest Service*, 861 F.2d 1114, 1119 (9th Cir. 1988).

In order to determine whether OE properly applied this Exemption, we obtained a copy of Document 34. At the outset, we note that the very nature of the withheld material, notes written by hand in the margins, suggests that it reflects the opinions of the author about the subject matter of the document, and not a final agency position. Our examination of the material confirmed this. We further find that the notes are predecisional, in that they reflect a part of the decision-making process that led up to the issuance of the Congestion Study. *See* memorandum of June 16, 2008, telephone conversation between Mr. Palmer, Mr. Whitenton and Ms. Brown Shute. They are also deliberative, in that they reflect the personal opinions of the author, rather than the final position of the DOE. The author's conclusions were subject to further review and analysis before the issuance of the Study. OE properly applied Exemption 5 in withholding these notes.

D. The Public Interest

Our finding that portions of this document are exempt from mandatory disclosure under Exemption 5 does not necessarily preclude release of the material to New York. The DOE regulations implementing the FOIA provide that “[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest.” 10 C.F.R. § 1004.1. In this case, the release of this predecisional, deliberative material could adversely affect the agency's ability to obtain straightforward and frank recommendations and opinions in the future. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (March 18, 1987) (Case No. KFA-0080). We do not believe that discretionary release of the withheld material would be in the public interest.

III. Conclusion

For the reasons set forth above, we find that OE properly determined that the CERA report and communications between CRA, the DOE and industry stakeholders that were not in the DOE's possession at the time of New York's request, are not “agency records.” We further conclude that the handwritten notes deleted from Document 34 were properly withheld under Exemption 5. We will therefore deny New York's Appeal.

It Is Therefore Ordered That:

- (1) The Appeal filed by the State of New York, Case Number TFA-0257, is hereby denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 18, 2008